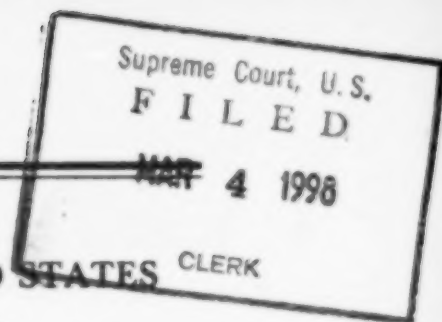


No. 97-634

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997



COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF CORRECTIONS;
JOSEPH D. LEHMAN; JEFFREY A. BEARD, Ph.D.;
JEFFREY K. DITTY; DOES NUMBER 1
THROUGH 20 INCLUSIVE,

Petitioners,

v.

RONALD R. YESKEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF *AMICUS CURIAE*,
THE REPUBLICAN CAUCUS OF THE
PENNSYLVANIA HOUSE OF REPRESENTATIVES
IN SUPPORT OF PETITIONER

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March 4, 1998

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**MOTION FOR LEAVE
TO FILE A BRIEF *AMICUS CURIAE***

The Pennsylvania House of Representatives, Republican Caucus (the "Caucus"), moves for leave to file the attached brief *amicus curiae* in support of Petitioners, the Pennsylvania Department of Corrections, *et al.*, (the "Department"). The Department declined to concur in the filing of this brief because the Caucus argues a broader constitutional principle than the Department now wishes to espouse. Since the Department declined to consent, the Caucus did not seek the consent of Respondent.

The Caucus has a particular interest in this case because of (1) its interest, from the perspective of state legislators, in the further delineation of the holding of *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), and (2) a case now pending in the United States Court of Appeals for the Third Circuit in which it is a party and in which the constitutional issues raised in this case may be dispositive. *Young v. Pennsylvania House of Representatives, Republican Caucus*.

In this case, the Department argues that the Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101, *et seq.*, cannot be construed to apply to state inmates and that prison management is a core state function such that federal law should be deferential to state determinations regarding inmates. In its petition for writ of certiorari, the Department also stated that "Congress's

enforcement power is not unlimited . . . It extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment and is 'remedial.' *City of Boerne v. Flores*, 117 S. Ct. 2157, 2164 (1997)." See Petition for a Writ of Certiorari at 11. However, the Department has indicated to the Caucus that it may not explore in its brief the broader issue of the contours of this Court's holding last Term in *City of Boerne*. The Caucus believes that the broader constitutional question merits consideration by the Court at least through a brief *amicus curiae*.

The Caucus wishes to file a brief addressing the intersection of *City of Boerne* with the provision of the ADA that imposes mandates on state actors. If the Court were to accept the Caucus's argument, that determination would be dispositive of the case.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The Pennsylvania House of Representatives, Republican Caucus ("the Caucus"), files this brief as *amicus curiae* in support of Petitioners because of (1) its interest, from the perspective of state legislators, in the further delineation of the holding of *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), and (2) a case now pending in the United States Court of Appeals for the Third Circuit in which it is a party and in which the constitutional issues raised in this case may be dispositive.*

The Caucus is part of the Pennsylvania General Assembly, which is the legislative branch of the Commonwealth of Pennsylvania.

SUMMARY OF ARGUMENT

In its last two Terms, the Court has carefully refined its Eleventh-Amendment jurisprudence. In *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996), and *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), the Court held that Congress could abrogate Eleventh-Amendment immunity only through Section 5 of the Fourteenth Amendment and that those enforcement powers are limited and cannot substantively modify the sweep of the Fourteenth Amendment. The *City of Boerne* Court

* No counsel for a party authored this brief in whole or in part, and no person or entity other than the named *amicus* made a monetary contribution to the preparation of this brief.

also held that congressional enactments must be narrowly tailored to address the particular harm to be remedied.

The Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101, *et seq.*, broadly regulates the states with regard to those with physical or mental disabilities. This Court has held that state actions or statutes challenged as discriminating against the disabled are due only a rational-basis review. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442-46 (1985). When conducting a rational-basis review, a court is to presume that a state action will survive an Equal Protection analysis. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

This Court's jurisprudence regarding rational-basis review suggests a modest extension of the *City of Boerne* holding: classifications that are to be afforded a rational-basis review are inappropriate bases for broad congressional action under Section 5. Such a rule comports generally and logically with this Court's jurisprudence.

In a larger sense, such a modest extension of the *City of Boerne* holding would be wholly consistent with the principles so necessary to "Our Federalism." In a series of recent cases, the Court has carefully re-examined the relative roles of the federal and state governments. Such an examination is critical because it implicates broad democratic principles.

ARGUMENT

I. Congress did not have the power to extend the Americans With Disabilities Act to govern the activities of the states.

The Caucus will limit its argument to two issues: the effect of this Court's decision in *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), on the pending case and the proper role of the federal legislature in light of "Our Federalism." *Younger v. Harris*, 401 U.S. 37 (1971).

In *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996), this Court held that congressional mandates on the states must meet a two-part test: (1) Congress must issue a "clear legislative statement" that it intends to abrogate the states' sovereign immunity and (2) Congress must act pursuant to a "valid exercise of power." 116 S.Ct. at 1123.

In *Seminole Tribe*, the Court overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), which held that Congress could abrogate state sovereign immunity through the Interstate Commerce Clause, Art. I, § 8, cl. 3, of the Constitution. After *Seminole Tribe*, Section 5 of the Fourteenth Amendment provides the sole means for Congress to abrogate sovereign immunity. *See, e.g., College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Board*, 131 F.3d 353, 358 (3d Cir. 1997) ("In fact, the Court overruled *Union Gas* by determining that the Commerce

Clause itself did not provide a basis for Congress to abrogate the states' immunity under the Eleventh Amendment.").

When a federal statute addresses the conduct of state actors, the recurring question will therefore be whether Congress acted within the scope of its Fourteenth-Amendment power in enacting whatever statute is under review.¹ That analysis is guided by the Court's decision last Term in *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), in which the Court examined the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb, *et seq.* The Court determined that RFRA was unconstitutional in that it exceeded Congress's power to enforce the provisions of the Fourteenth Amendment. 117 S.Ct. at 2172.

Congress' power under § 5, however, extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial." The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the

¹ For purposes of this brief, the Caucus presumes that Congress intended to abrogate state immunity through the Americans With Disabilities Act, 42 U.S.C. §§ 12101, *et seq.* (the "ADA"). In doing so, the Caucus does not concede that Congress expressed such intent and refers the Court to the brief of Petitioners.

States . . . Congress does not enforce a constitutional right by changing what the right is.

117 S.Ct. at 2164 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966)).

In *City of Boerne*, the Court held that "[r]emedial legislation under § 5 'should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against.'" 117 S.Ct. at 2170 (quoting *Civil Rights Cases*, 109 U.S. 3, 13 (1883)). The Court determined that RFRA was not so confined in that it swept so broadly that it affected every level of government both state and federal and all laws or regulations enacted by those governments. The Court concluded that "[t]he stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved." 117 S.Ct. at 2171.

The Court compared the broad mandate of RFRA with the limited remedies provided in statutes found constitutional. For example, the provisions of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973, *et seq.*, were limited to those regions of the country where voting discrimination had been most prevalent and the effect of those provisions lapsed seven years from their effective date. 117 S.Ct. at 2170. The Court explained

This is not to say, of course, that § 5 legislation requires termination dates,

geographic restrictions or egregious predicates. Where, however, a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5.

117 S.Ct. at 2170-71. The point, ultimately, is that a Section 5 enactment must be narrowly tailored to remedy the offense to the Fourteenth Amendment and must not proscribe an inordinate number of wholly constitutional state actions. "Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional." *City of Boerne*, 117 S.Ct. at 2170. The scope of the "remedial" statute must be proportionate to the magnitude of the harm to be prevented. "The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *City of Boerne*, 117 S.Ct. at 2169 (citing *South Carolina v. Katzenbach*, 383 U.S. at 308)).

State statutes and actions regarding the disabled that are challenged under the Equal Protection provision of the Fourteenth Amendment are afforded only a rational-basis review rather

than any form of heightened scrutiny. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442-46 (1985). "Rational-basis" describes the minimal level of review given state action under the Equal Protection Clause. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). The rational-basis inquiry is a deferential one and under it, courts must sustain state action unless the varying treatment of different groups or persons bears no rational relationship to any legitimate state purpose. *Frontiero v. Richardson*, 411 U.S. 677, 683 (1973). "Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations . . ." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

Under the Court's precedents, most classifications made by a state will be afforded a rational-basis review. *Dukes*, 427 U.S. at 302-3. The effect of this standard on the ability of a legislature to make law cannot be overstated because almost all state (and federal) laws or actions classify people in one sense or another. *Clements v. Fashing*, 457 U.S. 957, 967 (1982) ("Classification is the essence of all legislation, and only those classifications which are invidious, arbitrary, or irrational will offend the Equal Protection Clause of the Constitution."). Accordingly, if the Court were to determine that Congress may exercise its Fourteenth-Amendment enforcement power in a situation where state

action affects a classification due a rational-basis review, what was intended to be merely an enforcement mechanism would instead become a portal through which Congress could regulate almost all state action or legislation.²

Consider, for example, the result in *Oregon v. Mitchell*, 400 U.S. 112 (1970). There, the Court held that Congress could not lower the minimum age of voters in state elections. Justice Black wrote "Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit Congress to prohibit every discrimination between groups of people." 400 U.S. at 127. Given the breadth of classifications afforded a rational-basis review, extending the Enforcement-Clause power to such classifications would, in fact, allow Congress to "prohibit every discrimination between groups of people." *Id.* Without the restraining principle set forth in *City of Boerne*, Congress could change the

² As the Court noted in *City of Boerne*, at the time Congress was debating the Fourteenth Amendment, Ohio Congressman John Bingham offered an amendment that would have dramatically increased the power of Congress. 117 S.Ct. at 2164. Congress opted for a much more limited version of the constitutional amendment that "did not raise the concerns expressed earlier regarding broad congressional power to prescribe uniform national laws with respect to life, liberty, and property." 117 S.Ct. at 2165. Allowing Congress to legislate through the Fourteenth Amendment by heightening or suspending rational-basis scrutiny, would effectively set in place the rejected Bingham amendment.

outcome of practically every case in American history in which a distinction under state law was upheld under rational-basis scrutiny.

Another example may be similarly illustrative. Historically, the vast majority of criminal prohibitions have been matters of state law (e.g., murder, rape, assault, robbery). Of course, every criminal statute makes classifications, some among degrees of culpability, others among identities of victims. Were the Court to adopt a rule contrary to that urged by the Caucus, there would be no principled basis for preventing Congress from invading this traditional province of the states. For example, a future Congress might extend the "equal protection" of the Federal Sentencing Guidelines to the full range of state criminal law.

The overlay of the rational-basis analysis onto the teaching of *City of Boerne* suggests a modest refinement of the *City of Boerne* holding.³ Because a state action is ordinarily constitutional if it bears any rational relationship to a legitimate purpose, it is fair to presume most state statutes or actions would survive the analysis. Indeed, this Court has mandated such a presumption. *Dukes*, 427 U.S. at 303. In *City of Boerne*, the Court held that a congressional enactment that sweeps broadly may be appropriate so long as "many" of the state laws or actions it affects have a

³ The rule urged here by the Caucus echoes the holding of a 1996 decision of the Sixth Circuit in *Wilson-Jones v. Caviness*, 99 F.3d 203 (6th Cir. 1996).

"significant likelihood" of being unconstitutional. 117 S.Ct. at 2170. It is difficult to imagine how a broad congressional enactment that regulates state conduct with regard to classifications that receive a rational-basis review could meet the *City of Boerne* requirement of narrow tailoring, particularly given that those state actions are presumed constitutional under the precedent of this Court. *Dukes*, 427 U.S. at 303.

The suggested rule may be stated succinctly as follows: when a classification by a state warrants only a rational-basis review under the Equal Protection Clause, that classification is not a proper subject for a broad congressional mandate under the enforcement provision of the Fourteenth Amendment.⁴

The ADA provides a good example of the operation of the rule. While this Court has found that actions or statutes alleged to discriminate based on disability are to be afforded only a rational-basis review, Congress has effectively heightened, if not eliminated, the scrutiny.

⁴ In enacting RFRA, Congress specifically sought to overturn the Court's decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and "restore the compelling interest test as set forth in *Sherbert v. Verner*" 42 U.S.C. § 2000bb(b). In *City of Boerne*, the Court implicitly rejected the contention that Congress may proclaim the level of scrutiny with which purported constitutional violations are examined.

Consider, for example, two scenarios. In the first, a state employee brings an action in federal court under 42 U.S.C. § 1983 alleging a violation of his Equal Protection rights because of his hypertension.⁵ In the second, a state employee brings the same sort of challenge but under the ADA. In the first scenario, the defendant can argue that the state action had a rational basis. In the second, the defendant has available to him (or it) only the defenses available to any defendant under the ADA, none so deferential as the rational-basis review. For example, an ADA defendant may argue that a purportedly discriminatory job qualification is job-related and consistent with business necessity, but even if so, it must offer a reasonable accommodation. 29 C.F.R. § 1630.15(b)(1).

The effect of Congress's inclusion of the states as potential ADA defendants is to subject state action to a heightened review never demanded by this Court and to require affirmative accommodation by the states that is not in accord with the discretion this Court has allowed when considering the disabled as a class for Equal Protection purposes.⁶

⁵ Set aside, for purposes of this argument, issues of immunity and preemption.

⁶ The result would be different if the challenge were based on a racial classification. The Court has consistently held that racial distinctions are to be examined with strict scrutiny. *United States v. Virginia*, 116 S.Ct. 2264, 2275 n.6 (1996). Accordingly, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§

Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.

City of Boerne, 117 S.Ct. at 2172 (citing *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

The *City of Boerne* holding applies with equal vigor in this case. In its Fourteenth-Amendment jurisprudence, the Court has recognized a minimal standard of review for classifications based on disability; in enacting the ADA and applying it to the states, Congress has

2000e, *et seq.*, is unlikely to be viewed as overinclusive and, therefore, to cross the proscribed line between legislation that is remedial and that which enlarges substantive rights.

enlarged rather than preserved existing rights and those "contrary expectations must be disappointed."

II. Fundamental Principles of Federalism Will Be Advanced by Resolving This Case in Favor of Petitioners.

Congress has fallen into the habit of behaving as though it has general police power over all persons, entities and pursuits. Congress seems to treat its enforcement power under the Fourteenth Amendment as a convenient complement to its power under the Commerce Clause, with the sum of the two being authority over all private and public activity in the United States. The statute at issue in this case, the ADA, regulates private activity under the Commerce Clause (the reach of which is not at issue in this case) and public activity purportedly under the Fourteenth Amendment. The continuing federalization of our law is a phenomenon of which the federal judiciary, in particular, may take notice, in part because of the impact on its dockets.

This Court's recent decisions in *City of Boerne* and in *Printz v. United States*, 117 S. Ct. 2365 (1997), *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996), and *United States v. Lopez*, 514 U.S. 549 (1995), signaled a return to principles of federalism that can restrain this tendency. These principles are essential for the furtherance of democratic values. Adherence to these principles, moreover, will strengthen the nation, while their abandonment will weaken it.

The states can and do respond to their citizens. Although the alleged unresponsiveness of the states is invoked as a non-constitutional justification for federal intervention in a field, it is often forgotten that, historically, the federal government suppressed humane social initiatives by the states. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905). In a sense, the federal government did not stop suppressing such state initiatives until it was ready to dominate the field.

In the area of human rights, many states nevertheless are more liberal than the federal government. "State Constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977). Citizens of the Commonwealth of Pennsylvania, for example, enjoy constitutional rights that are not found in the Constitution of the United States. See, e.g., PA CONST., Art. I, § 27; (environmental rights) and Art. I, § 28 (equal rights on the basis of gender). Furthermore, as Justice Brennan later observed, "the state courts have responded with marvelous enthusiasm to many not-so-subtle invitations to fill the constitutional gaps" William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 549 (1986).

Another common justification offered for federal intervention is that there is a need for uniformity. Uniformity, though, is not the goal of a federal system. The ability to have non-uniformity is a positive value which permits the continuous evolution of standards that balance the best, tested ideas with idiosyncratic local concerns.⁷ A corollary to the concept of the states as laboratories of democracy is the concept that they must be independent laboratories, not working under federal contract, in order to fulfill the function. They must have real sovereignty, i.e. the ability to err (or to do nothing) with impunity, in order to struggle toward the best solutions. The United States is a vast and diverse nation. In the long term, our federal structure needs to accommodate diversity in the same sense that any large structure should not be so rigid that it cannot withstand stresses.

Those who crave a general, national government are putting themselves in conflict with more than just the unbroken constitutional doctrine of limited, delegated federal powers. They are short-sightedly diminishing the ability of our system to flex to accommodate diverse priorities and needs. Each time that Congress mandates action by the states, it is substituting its own

⁷ The finest example of this process is the Uniform Commercial Code, the result of quiet, continuing dialogue among the states. The Caucus has, of course, great respect for Congress, but doubts that it could maintain such a stable body of law if it chose to federalize it.

determination of priorities for those of the individual states.

The proponents of a general, national government are also overlooking the implications of a basic doctrine accepted by every state — that every person has the fundamental right to equal representation and equal voting rights in state government. See *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). The constitutional structure of the federal government makes it less representative than the structure of the states. All elected state and local officials must be chosen on a one-person-one-vote basis, but no federal official is. In the United States Senate, senators representing about seven percent of the U.S. population have 20 per cent of the seats. Even U.S. House districts vary significantly in population from state to state, with the largest being 75 per cent larger than the smallest. The 1990 Census data show that, under the electoral college system, the President could be elected in a two-way race by as little as 23 per cent of the national vote. The representational disparities have been increasing. In 1790 the biggest state was only about 12 times more populous than the smallest state. In 1990 our largest state was 65 times more populous than our smallest.

It is not too far-fetched to imagine what could happen if Congress, left unchecked by the Court, completes the transformation of the federal government into a general government. Functionally, the states could become mere

regional offices of the various federal departments, administering federal policy. Electorally, the states would still be the constitutionally-defined constituencies from which federal officials are elected. But our smaller states might eventually come to be regarded in the same way as the British rotten boroughs, which, by the early nineteenth century, were viewed as having intolerable overrepresentation in Parliament. Under the British constitution, Parliament was able to ameliorate the inequities of representation by passing the Reform Bills of 1832, 1867 and 1884. Our Constitution, however, would not allow such a remedy and, so, the judiciary must prevent federal usurpation of power that could lead to unmanageable tension.⁸

The constitutional compromise embodied in the federal electoral structure was accepted on the premise that the federal government would not supplant the states and become a general government. See *THE FEDERALIST* No. 39, at 245 (J. Madison). This premise was still important at the time of the adoption of the Fourteenth Amendment. See discussion *supra* note 2. The assumption of general police power by the United States violates the fundamental principle of equal representation

⁸ To obtain an equal population in each House district, the Constitution would have to be amended to allow House districts to cross state lines. To elect the President on a one-person-one-vote basis would require changing or abolishing the Electoral College. To provide one-person-one-vote representation in the Senate would require the consent of each state.

that should be the foundation of a general government. A disciplined federalism will keep us from reaching this point, while allowing Congress to exercise the great national powers that have been delegated to it.

CONCLUSION

For these reasons, the Caucus urges that this Court reverse the decision of the United States Court of Appeals for the Third Circuit.

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